IN THE

Supreme Court of the United States

October Term 1945

No. 566

LANSBURGH & BRO., A Corporation,
Petitioner

v.

DORIS E. DEFFEBACH,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

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WILSON · EPES PRINTING CO. — RE 6005—WASHINGTON 1, D. C.

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OPINIONS BELOW

The opinion of the District Court directing a verdict in favor of plaintiff was entered on October 5th, 1944 (R. 42). The opinion of the Court of Appeals of the District of Columbia, reversing the judgment of the District Court (R. 45-46) is reported in 150 Fed (2d) 591.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered June 29, 1945 (R. 47). The petition for a writ of certiorari was filed on October 29th, 1945. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

SUMMARY STATEMENT OF THE CASE

This is a civil action instituted in the District Court of the United States for the District of Columbia, by the respondent, Doris E. Deffebach. She seeks to recover damages for personal injuries suffered by her on the 17th day of January 1942, as the result of the burning of a chenille robe then being worn by her, which she had two weeks previously purchased from petitioner, the operator of a department store in the District of Columbia. The respondent pitched her claim upon a breach of implied warranty on the part of petitioner and expressly rejected any claim of right to recover under the laws of negligence, both in her complaint, in the pretrial order, and during the progress of the trial.

It appears from the record that on January 3, 1942, the respondent, forty-four years of age, and a law school graduate, was shopping for lounging robes. She had purchased one at the Hecht Company and then went to the basement in petitioner's store and purchased "a blue sort of Copenhagen blue chenille robe with a soft nap or pile or design of robe and it was a coat style robe." The robe when worn, folded over the right side into strings which were tied with a short sash which had to be tied into a double knot to secure it. Respondent wore the robe a couple of times between the date of its purchase on January 3, 1942, and the date of the accident on January 17, 1942. It had not been laundered or cleaned.

At the time of the purchase of the robe, it was on display with others on a rack in petitioner's store. Respondent tried on various robes. No salesgirl waited on her. She finally selected the robe in question and took it over to the salesgirl, had it wrapped up and took it home. She testified that up until the night of the accident "she had used the robe as an ordinary robe would be used." On Saturday afternoon, January 17, 1942, respondent was home with a cold. Friends called upon her and she and they had "a highball or two—I am not positive which—in the afternoon" (R.-29). They then went out to dinner and returned to the respondent's apartment and discussed matters incident to law school activities. Respondent did not have anything further to drink. Late in the evening, as the guests were leaving, respondent invited a female friend to spend the night with her. At this time the respondent, wearing the robe, lighted a cigarette. "Whether in fanning out the match the robe ignited or whether a spark shot from the match and ignited the robe, I don't know because, like this, I was a shot of flames; I was just covered with flames." (R-24). "At the same moment I saw a blue flame, shot with red at the extreme top, shooting over her left shoulder, and up on the left part of her back." (R-6). "It happened so suddenly that it was almost, well, quicker than you snap your fingers almost. I have never seen anything like it." (R-7). "It was perfectly awful. Naturally, I was horrified. Mr. Cooney and I both jumped for her. I dropped what I had in my hands, the coats, on the floor, and sprang for the back of her, and he for the front of her, and I pulled it off from the nape of her neck, or left shoulder and left side of the back. Mr. Cooney reached her from the front and pulled this robe from the left front. This robe had been tied around her waist with a double knot so that it was impossible for us to pull the garment any farther than to her waist."

"Miss Deffebach was so shocked and so hurt that she

screamed several times. We finally got her to the floor—I shouldn't say "finally" because it wasn't but a second before I got her on the floor, and reached for the small scatter rug but, realizing that the scatter rug wasn't going to be large enough to completely cover her because she was partly on it, I reached for the cover on this day bed and wrapped that around her, thereby smothering the flames." (R-7).

What was left of the robe was exhibited to the jury. The respondent was badly burned and was hospitalized requiring medical care for months after the occurrence.

At the end of respondent's case, petitioner's counsel moved for a directed verdict, which was granted as follows:

> "The Court (Bailey, J.): Members of the Jury, this suit is a suit on what is called an implied warranty; that is where anyone purchases goods, the seller implies that those goods are reasonable and suitable for the purpose for which they are bought. The law, however, provides that if the buyer has examined the goods, there is no implied warranty as regards any defect which such examination ought to have revealed.
>
> Now, there is no claim here, no evidence, that there was any chemical or other material impregnated in this garment that would not appear on the surface. It was simply a garment, which you might say was fuzzy on its surface, and one which might burn more freely than a garment of open material.
>
> So that, under the law, I think here is no implied warranty, and I will give you that order, to return a verdict for the defendant."

An Appeal was taken from the judgment on the verdict so directed to the United States Court of Appeals for the District of Columbia where it was there argued before Justices Edgerton, Miller and Arnold.

The Court of Appeals on June 29, 1945, reversed the judgment of the trial court and handed down its opinion which is published in 150 Fed. 2d 591. A petition for re-

hearing was filed by petitioner on July 6th, 1945. This petition was denied on August 4, 1945 with the notation that Judge Arnold considered the petition for rehearing before he resigned, and was of the view that the petition should be denied. (R-52). Motion for Leave to File Petition for Consideration of Petition for Rehearing or Modification by Entire Court was also filed and denied by the Court on September 10, 1945. (R-53).

QUESTION OF LAW PRESENTED

Did respondent, as a matter of law, submit sufficient evidence at the trial of the case to have the jury pass upon the question of whether or not this robe was reasonably fit for the purpose for which it was sold?

STATUTE INVOLVED

The Statute involved in this case is the following:

> D.C. Code 1940, Title 28, Section 1115. "Subject to the provisions of chapters 11-16 of this title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * * *
>
> If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. * * * (Mar. 17, 1937 50 Stat. 32, ch. 43, p. 15.)"

REASONS RELIED UPON IN OPPOSITION TO THE WRIT

Whether or not this robe which burned with such extreme rapidity was fit to be worn is surely a factual question, and whether respondent relied upon the seller's skill and judgment or her own skill in the selection of the robe is also a question for a jury.

ARGUMENT

The only question before the Court of Appeals of the District of Columbia in this case was whether or not the trial court erred in instructing the jury that there was no warranty as the buyer had examined the goods as regards the defect which such examination of it ought to have revealed. Respondent claimed, and still does, that whether or not respondent's examination ought to have revealed the defect which certainly existed in this robe because of its poor construction, was a question which was peculiarly within the province of the jury. As was stated in *Keenan v. Cherry* (47 R.I. 125; 131 Atl. 309):

> "Inasmuch as the fundamental test under the implied warranty is whether the buyer justifiably relies on the seller's skill and judgment, the Uniform Act leaves inspection as an important, but not conclusive, element to be considered in determining the question of reliance. It treats reliance as a question of fact."

Petitioner, in its brief argues that the last sentence of the decision of the Court of Appeals in this case robs it of the opportunity, when the case is retried, of presenting evidence concerning respondent's knowledge of the texture of this garment, her knowledge as to its tendency to catch fire and burn rapidly if brought in contact with fire, and many other questions of fact which only the jury could settle. That sentence is as follows: "Accordingly, we think

the jury should have been instructed that if the robe caught fire and burned as the witnesses testified, there was a breach of appellee's implied warranty of fitness."

This is clearly a correct statement of the law so far as the evidence which the Court of Appeals had before it at the time. What is meant by this sentence, it is submitted, is that upon the state of testimony at the conclusion of respondent's case, there being no evidence to the contrary, the jury should have been instructed that if they believed the evidence as to the manner in which the robe burned that they must find that there was a breach of warranty, unless, of course, the examination which respondent made of the robe at the time of its purchase should have revealed to her its highly flammable quality. It was not necessary for the Court of Appeals to have added in its opinion the matter of inspection because that is stated in the Statute itself as follows:

> "If the buyer has examined the goods there is no implied warranty as regards defects which such examination ought to have revealed."

Certainly, on a retrial of this case, petitioner will have every opportunity to present evidence and argument that respondent's examination ought to have revealed to her that this was a dangerous robe to wear and is not deprived of that opportunity by the opinion of the Court of Appeals because that opportunity is given to it as a matter of law in the Statute itself.

Respondent testified on cross-examination (R-26), "I don't know anything about goods. It looked all right to me. I gave it a very cursory examination. I assumed it would be all right. I certainly would not buy anything if it ever occurred to me that it might ever catch on fire." At a prior trial of this case, on cross-examination she had answered "Yes, I looked at it very carefully." (R-27). Again the issue presented is clearly a jury question.

Petitioner's further point that the petition for rehearing should have been granted by the full bench of the Circuit Court is without merit because the granting of such a petition lies within the discretion of the Court of Appeals itself. Further the petition for a rehearing before the three Justices who heard the argument is clearly covered by the rules themselves which state that a majority of the justices in this case, two of the three, would have to vote to grant a rehearing where, according to the record, the three Justices voted against the rehearing.

CONCLUSION

The decision below is correct and there is no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied .

Respectfully submitted,

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